COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 97-116
Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 99-39

REPLY OF VERIZON MASSACHUSETTS

Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") submits this reply to comments filed by various parties on August 1, 2002, in response to the Hearing Officer's request for comments on Verizon MA's Motion to Reopen Docket Nos. D.T.E. 97-116 and D.T.E. 99-39 filed on July 24, 2002.[1] In many instances, the parties' comments go well beyond the Hearing Officer's request for comments addressing Verizon MA's motion and seek instead to reargue the merits of the case. To the extent the parties' comments do address Verizon MA's Motion to Reopen, they generally oppose it. Indeed, only AT&T agrees that the Department should reopen these proceedings and resolve any open issues of contract interpretation. *See* AT&T Comments at 1. The parties who oppose reopening these dockets

[1] The following parties filed comments: AT&T Communications of New England, Inc., on behalf of itself and its affiliates (collectively referred to as "AT&T"), Global NAPs, Inc. ("GNAPs"), RNK, Inc., d/b/a RNK Telecom, and WorldCom. In addition, XO Communications has sought intervention contemporaneous with its submission of comments. While Verizon MA believes that the arguments raised by XO in opposition to its motion are without merit for the reasons discussed in this reply, Verizon MA does not oppose their intervention in D.T.E. 97-116. However, Verizon does oppose XO's petition to intervene to the extent it seeks intervention in D.T.E. 99-39 since that docket relates solely to the terms and conditions of a specific interconnection agreement between Verizon and GNAPs, to which XO is not a party and which XO has not adopted. There is thus no basis for XO's participation in that docket.

offer several reasons in support of their opposition. First, various parties argue that the Department lacks the authority to reopen these dockets generally because there is a pending appeal involving the same issues before the United States District Court, or at least in the absence of express leave from that court. GNAPs Comments at 4-8, WorldCom Comments at 4-7; XO Comments at 4-6. One carrier argues that proceeding in the manner proposed by Verizon MA would be administratively inefficient. XO Comments at 2-4. Carriers also argue that, even if the Department were to grant Verizon MA's motion, the "truncated" procedure proposed by Verizon MA would potentially violate their due process rights. *See, e.g.*, WorldCom Comments at 7-9; XO Comments at 6-7. GNAPs and RNK argue that reopening these dockets for purposes of clarifying the Department's prior rulings is unnecessary since the Department has already interpreted the interconnection agreements correctly in its October 1998 decision in Docket No. 97-116 and thus contend that reexamination of the meaning of the language in those interconnection agreements is unnecessary. RNK Comments at 5; GNAPs Comments at 2-3. As discussed below, there is no merit to these arguments and the Department should grant Verizon MA's Motion to Reopen.

The Department has appropriately interpreted the language of both the WorldCom and GNAPs Agreements—the only agreements subject to the pending consolidated appeal in *Global NAPs, Inc. v. New England Telephone & Telegraph Co.*, Nos. 2000CV10407RCL, *et al.* (D. Mass.)—and properly concluded that reciprocal compensation is not required under either of those agreements. The Department's interpretation of the relevant portions of those agreements and its conclusions are clearly set forth in the Department's written decisions D.T.E. 97-116-C (1999); D.T.E. 97-116-D (2000) (denying reconsideration of D.T.E. 97-116-C and dismissing GNAPs' complaint in D.T.E. 99-39); D.T.E. 97-116-E (2000) (denying motion to vacate D.T.E. 97-116-C and 97-116-D and to reinstate D.T.E. 97-116); D.T.E. 97-116-F (2001) (denying

requests to vacate D.T.E. 97-116-C, D.T.E. 97-116-D, and D.T.E. 97-116-E). Both the Department and Verizon MA have clearly communicated their view on this issue to the U.S. District Court in their recent objections filed in opposition to the Magistrate Judge's July 5, 2002 Findings and Recommendations ("F&R"). Despite this fact, WorldCom and GNAPs have repeatedly argued, and continue to argue before the Department and the Federal Court that the Department has failed to interpret their agreements in its reciprocal compensation rulings issued since May of 1999. As noted in Verizon MA's Motion, the Magistrate Judge's F&R also raised a question with regard to this issue. *See* Verizon MA's Motion at 3. Verizon MA has therefore filed its Motion to Reopen these proceedings in an effort to remove any remaining doubt as to whether the Department's conclusion that these two contracts do not require reciprocal compensation for Internet-bound traffic was based on an interpretation of the language of those two contracts. In short, Verizon MA has done nothing more than propose that the Department move expeditiously to provide precisely the clarification that GNAPs and WorldCom have argued is necessary. If such clarification is truly what the parties seek (as they have repeatedly asserted), they have no reasonable basis to complain if the Department grants Verizon MA's Motion.

I. THE DEPARTMENT HAS THE AUTHORITY TO REOPEN THIS DOCKET, AND DOING SO FOR THE PURPOSES REQUESTED IN VERIZON MA'S MOTION WILL NOT INTERFERE WITH THE JURISDICTION OF THE FEDERAL COURT

A. The Procedural History Of This Case Supports The Department's Authority To Reopen These Dockets For The Purposes Requested In Verizon MA's Motion.

While various parties argue that the Department cannot and should not reopen these dockets at this point, none provides any legal authority that should be construed to preclude the Department from doing so. Indeed, the suggestion that the Department lacks such authority is undermined by the procedural history of this case. The Department has already reopened these

dockets on two previous occasions since GNAPs and WorldCom filed their respective appeals for purposes of conducting further review of the reciprocal compensation issues pending before the U.S. District Court. First, following the release of the D.C. Circuit decision in *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), and after WorldCom and GNAPs had filed their initial appeals of the Department's decision in D.T.E. 97-116-C, GNAPs filed a motion with the Department asking the Department to vacate its May 1999 and February 2000 Orders in light of the D.C. Circuit's decision. In response to GNAPs' motion, the Department reopened Docket No. D.T.E. 97-116 on April 14, 2000, and requested briefing on the effect of the D.C. Circuit's decision on the Department's May 1999 and February 2000 Orders. *See* Hearing Officer Memorandum, D.T.E. 97-116/99-39 (April 14, 2000). Subsequently, on April 24, 2000, the Department filed a motion seeking a remand of the pending federal appeals to the Department in light of the pending administrative action, or alternatively that the District Court stay its proceedings pending further administrative review. *See* Motion of the Massachusetts Department of Telecommunications and Energy For Remand or, in the Alternative, For Stay of the Action Pending Further Administrative Review, *Global Naps, Inc. v. New England Telephone and Telegraph Company, d/b/a Bell Atlantic Massachusetts, et al.*, Civil Action No. 00-CV-10502-RCL (April 24, 2000). Verizon MA and WorldCom assented to the Department's motion. *See id.* Only GNAPs reserved its rights and subsequently opposed it. Despite GNAPs' objection, the District Court Magistrate Judge subsequently granted the Department's request for a remand. Following a review of briefs submitted by the parties, the Department issued an order denying GNAPs' motion to vacate on July 11, 2000. D.T.E. 97-116-E (July 11, 2000).

Following the issuance of the *Order on Remand*,[2] the Department again reopened Docket No. 97-116 to "consider the effect of the [*Order on Remand*] on the issue of reciprocal compensation for ISP-bound traffic in Massachusetts." *See* Hearing Officer Memorandum, D.T.E. 97-116 (May 23, 2001); D.T.E. 97-116-F (August 29, 2001). Verizon MA and other parties to that docket, including RNK, GNAPs, AT&T, and WorldCom, submitted initial and reply comments, and the Department issued a further written decision on August 29, 2001. *See id.* No party objected to the Department's actions at that time. Thus, the procedural history of this case clearly demonstrates that the Department has the authority to take the action requested in Verizon MA's motion.

B. Granting Verizon MA's Motion Will Not Undermine The Jurisdiction Of The Federal Court Or Violate Principles Of Comity.

Granting Verizon MA's request to re-open these proceedings would not threaten the District Court's jurisdiction or undercut judicial review. WorldCom cites *Exxon Corp. v. Train*, 554 F.2d 1310, 1316 (5th Cir. 1997), for the proposition that an agency lacks authority to deprive a court of jurisdiction to review agency action after proceedings to review the action have been properly instituted. But its reliance on *Train* is misplaced — re-opening these proceedings would not deprive the District Court of jurisdiction.

In *Train*, the court concluded that the agency's decision to re-open would divest the court of jurisdiction by making the order from which appeal had been taken non-final. *See Train*, 554 F.2d at 1316 (explaining that the agency "simply declared the matter re-opened and then demanded that we dismiss the petition [for review] for lack of finality."). But the Supreme Court has made clear that not all re-openings divest a court of jurisdiction in this way, because

[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, IntercarrierCompensation for ISP-bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (released April 27, 2001) ("*Order on Remand*").

jurisdiction is not "indivisible" and can be shared between an agency and a court. In *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970), the Court rejected the idea of "an indivisible jurisdiction which must be all in one tribunal or all in the other" and concluded that a court of appeals can consider an appeal from one party subject to a rule while other parties petition the agency for rehearing of the same rule. In *United States v. Benmar Transport and Leasing Corp.*, 444 U.S. 4, 6 (1979), the Court took the concept of shared jurisdiction further and concluded that a court should consider agency decisions taken after an appeal from the agency has been filed so long as Congress has not prohibited the agency from re-opening its decisions. The First Circuit also has rejected the idea of indivisible jurisdiction. In *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979), the court concluded that a District Court could consider a Rule 60 motion to amend a judgment without interfering with the jurisdiction of the court of appeals reviewing that judgment.[3]

If the Department grants the petition to reopen, the District Court will retain jurisdiction over the case currently pending before it; jurisdiction will be shared between the Department and the District Court. The Department's action will not render its prior orders non-final, it will simply clarify them. It might be appropriate for the Department to request that the District Court delay consideration of the exceptions to the Magistrate Judge's report until the Department has clarified its orders, but the District Court would not lose jurisdiction over the case even if it granted that request. Accordingly, re-opening these dockets would not interfere with the court's authority, it would help ensure that the court acted on the basis of a complete record.

[3] *Zenith Electronic Corp. v. United States*, 699 F. Supp. 296, 297 (C.I.T. 1988), which WorldCom also cites to show that re-opening is impermissible, does not support that view. The case recognizes that in some circumstances an agency can clarify a decision while appeal from the decision is pending. In so doing, it relies on an analogy to Rule 60. *See id*.

Both WorldCom and Global Naps attempt to distinguish *American Farm Lines* and *Benmar*, but their efforts fail. Global Naps contends that the cases only apply to re-opening by the Interstate Commerce Commission, which has authority "at any time" to grant rehearings and reverse or modify its orders. *See* GNAPs Opposition at 5. According to Global Naps' view of the cases, re-opening while review is pending is improper unless there is specific statutory authority to re-open. But this interpretation reverses the presumption established in *Benmar*. That case makes clear that re-opening an administrative docket is permissible unless Congress "chooses to place" restrictions on an agency's ability to re-open a matter once an appeal has been filed. *See Benmar*, 444 U.S. at 6; *see also Wrather Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646 (D.C. Cir. 1957) ("The concept of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit other statutory schemes, but not that of the Communications Act.") (citation omitted).[4]

WorldCom contends that *American Farm Lines* and *Benmar* should be distinguished because the agency decision to re-open in both cases took place before the court's review of the merits had commenced. This also is not a convincing distinction. Here, too, the District Court has not begun considering the case on the merits: briefing will not be completed until later this week. To be sure, the Magistrate Judge has considered the parties' contentions and entered a recommendation in this case. But re-opening the proceedings will not interfere with the Magistrate Judge's work, it will help clarify the case in light of her recommendation. A District Court's standard of review for a Magistrate Judge's report and recommendation is de novo when objections are made to the report and recommendation. *See* Fed.R.Civ.P. 72(b) ("The district court judge to whom the case is assigned shall make a de novo determination upon the record, or

[4] This distinction might help explain the result in *Train*: In that case, there was a statutory deadline under which the agency was required to complete the proceedings that it later attempted to re-open. *See* 554 F.2d at 1315-16.

after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule."). The District Court's consideration of the case is not limited to the record before the Magistrate Judge, and thus re-opening the docket need not interfere with the District Court's consideration of the case.

Finally, WorldCom's contention that the Department should refrain from re-opening the case in the interest in comity gets comity exactly backwards. If comity has any role to play in this matter, it counsels in favor of a District Court decision to delay consideration of the case until the Department – charged with interpreting the agreements in the first instance – has an opportunity to clarify its orders.

II. THE FCC'S DECISIONS IN THE *COX* AND *STARPOWER* CASES DO NOT SUPPORT GNAPS' AND WORLDCOM'S CLAIMS THAT THEIR INTERCONNECTION AGREEMENTS REQUIRE THAT RECIPROCAL COMPENSATION PAYMENTS FOR ISP-BOUND TRAFFIC

GNAPs and AT&T erroneously argue that the memorandum Opinion and Orders issued by the FCC in *Starpower Communications, LLC v. Verizon South, Inc.*, No. EB-00-MD-19-20, FCC 02-105 (rel. April 8, 2002) ("*Starpower*") and *Cox Virginia Telecom, Inc. v. Verizon South, Inc.*, No. EB-01-MD-006, FCC 02-133 (rel. May 10, 2002) support their position that the GNAPs and WorldCom agreements are eligible for reciprocal compensation and the Department's October, 1998 decision was correct. GNAPs Comments at 10-12; AT&T Comments at 4-8. In fact, these decisions confirm that the Department's decisions, D.T.E. 97-116-C, D, E, & F are correct and that the GNAPs and WorldCom interconnection agreements did not require reciprocal compensation for ISP-bound traffic.

A. THE STARPOWER CASE

Starpower strongly supports the Department's rulings that the GNAPs and WorldCom interconnection agreements do not provide for reciprocal compensation payments for ISP-bound

traffic. In particular, the FCC found that agreement terms very similar to those at issue here "unambiguously" excluded reciprocal compensation for Internet-bound traffic. Moreover, the FCC reached that conclusion largely for the same reasons as the Department – namely, where, as here, an interconnection agreement tracks the FCC's understanding of federal reciprocal compensation requirements, that agreement is properly understood to adopt the federal agency's rules, which have never required reciprocal compensation for Internet-bound traffic.

Starpower involved the same basic question as that currently at issue in the pending federal appeals and this docket generally: whether specific interconnection agreements obligate Verizon to pay reciprocal compensation for Internet-bound calls originated by Verizon customers and routed through Internet service providers ("ISPs") served by a competitive local exchange carrier. Because the relevant state commission (the Virginia Corporation Commission) declined to resolve that dispute, the FCC was called upon to do so. *See* 47 U.S.C. § 252(e)(6).

The FCC held that, as to two of the three agreements at issue, Verizon did not owe reciprocal compensation for Internet-bound traffic. In reaching that conclusion, the FCC stressed that, not only did those agreements state that the designation of traffic as "local" should be determined on an "end-to-end" basis, but also the agreements' definition of "local traffic" mirrored the FCC's regulations defining the traffic subject to reciprocal compensation requirements. *See Starpower* ¶¶ 26-31. In particular, the agreements defined "local traffic" as traffic that "originates" and "terminates" in a "local calling area as defined by tariff or the Commission." *Id.* ¶ 31. In its 1996 *Local Competition NPRM* and in its rules issued later that year, the FCC likewise defined "local telecommunications traffic" as traffic that originated and terminated in the same local calling area. *See Starpower* ¶ 31 (citing 11 FCC Rcd at 14249, ¶ 230 and 47 C.F.R. § 51.701(b)). The FCC explained that where the language of an interconnection agreement mirrors the FCC's reciprocal compensation regulations, that

"reveal[s] an intent" for the agreement to "track the [FCC's] interpretation of the scope of section 251(b)(5)," the statutory reciprocal compensation provision. *Id.* In this way, the parties indicated that "whatever the Commission determines is compensable under section 251(b)(5) will be what is compensable under the agreements." *Id.* The FCC thus concluded that the parties "unambiguously" agreed "*not* to treat ISP-bound traffic as 'Local Traffic' for reciprocal compensation purposes" because, among other things, their agreement "track[ed] the Commission's construction of section 251(b)(5)." *Id.* ¶ 36. The FCC, of course, has repeatedly construed section 251(b)(5) not to require reciprocal compensation for Internet-bound traffic.

By contrast, the FCC concluded that the third agreement did require payment for Internet-bound traffic. The FCC found that the third agreement "*differ[ed] significantly*" from the others in that it "d[id] not track the language used by the Commission to implement section 251(b)(5)." *Id.* ¶ 47 (emphasis added). The FCC explained that this particular agreement's definition of "local traffic" "neither speaks in terms of 'origination' and 'termination' of traffic, nor references local calling areas." *Id.* Instead, the FCC ruled that this last agreement defined "local traffic" in terms of how Verizon bills its end-user customers under its tariff. *See id.* ¶¶ 42, 44-45.

Starpower thus confirms that the Department's decisions (D.T.E. 97-116-C, D, E, & F) should be affirmed. The FCC's order establishes as a matter of law that where, as in this case, an interconnection agreement entered into pursuant to the Federal Telecommunications Act of 1996 mirrors the FCC's reciprocal compensation regulations or proposed regulations implementing that same statute, the agreement should be interpreted to require such compensation only when mandated by federal law.[5] The FCC's understanding on this point is entitled to significant

[5] Although the FCC suggests at paragraph 48 of the *Starpower* decision that Verizon placed "too much stock" on *AT&T Communications v. BellSouth Telecommunications, Inc.*, 223 F.3d 457 (4th Cir. 2000), a case that Verizon has cited here as well, that conclusion is immaterial to this case, given the FCC's conclusion in *Starpower* itself that agreement language that tracks federal law should be understood to adopt federal law requirements. *See Starpower* ¶ 31.

deference. As then-Judge Scalia explained for the D.C. Circuit, it would be "foolish not to accord great weight to the judgment" of an expert federal agency as to issues of contractual interpretation in the agency's field of expertise. *Kansas Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983).

The FCC's holding is particularly important to the facts at issue here because the language of the agreements in this case, as in *Starpower*, is "strikingly similar[]" to the key components of the FCC's then-applicable regulatory understanding of "local telecommunications traffic." *Starpower* ¶ 31. In particular, both agreements at issue in this case define "Local Traffic" and reciprocal compensation obligations in terms of traffic that both "originates" and terminates" in the same calling area. Thus, section 1.38 of the Verizon-WorldCom Agreement (like the substantively identical language in the Verizon-GNAPs Agreement[6]) defines "Local Traffic" as:

> a call which is *originated* and *terminated* within a given [local access and transport area], in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 5, except for those calls that are specified to be terminated through switched access arrangements.

(emphasis added). Similarly, the Verizon-WorldCom Agreement (and, again, the Verizon-GNAPs Agreement as well[7]) specifies at Section 5.8.1 that:

> Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by [Verizon] or [WorldCom] which a Telephone Exchange Service Customer *originates* on [Verizon's] or [WorldCom's] network for *termination* on the other Party's network . . . .

[6] That agreement states at section 1.38 that "'Local Traffic' means a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 6."

[7] The Verizon-GNAPs Agreement states at section 5.7.1: "Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by [Verizon] or GNAPS which a Telephone Exchange Service Customer originates on [Verizon's] or GNAPS's network for termination on the other Party's network . . . ."

(emphasis added). For these purposes, these provisions are substantively indistinguishable from the language in the agreements the FCC held did not require compensation because they tracked federal law. For instance, the first *Starpower* agreement states:

> "Local Traffic" is "traffic that is *originated* by a Customer of one Party on that Party's network and *terminates* to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in [Verizon Virginia's] effective Customer tariffs . . . ."
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> * * *
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> [Reciprocal compensation] refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic *originating* on one Party's network and *terminating* on the other Party's network.

Starpower ¶ 6 & nn.16 & 18 (citing First Starpower-Verizon Virginia Agreement at 6, 8, ¶¶ 1.44, 1.61) (emphasis added). Moreover, again like the first two *Starpower* agreements, both the WorldCom and GNAPs agreements at issue here specify that reciprocal compensation is "as Described in the Act" which means that it is "as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department." Verizon-WorldCom Agreement §§ 1.6, 1.53; Verizon-GNAPs Agreement §§ 1.6, 1.54; *see Starpower* ¶¶ 6, 29 & n.96. Additionally, in *Starpower*, the FCC specifically rejected arguments that are identical to those that the plaintiffs have raised here. Those arguments include the claim that the "regulatory context" at the time of these agreements supports the conclusion that Internet-bound traffic should be treated as though it were local. *See Starpower* ¶¶ 33-38.

In sum, while the WorldCom and GNAPs agreements do not include a specific reference to analyzing local calls on an "end-to-end" basis, they include language substantively indistinguishable from that the FCC relied upon to conclude that the parties intended to track the FCC's regulatory understanding and thus, by their "plain meaning," did not require

compensation for Internet-bound traffic. *See Starpower* ¶¶ 31, 36, 41. Accordingly, *Starpower* provides further support for the correctness of the Departments currently effective reciprocal compensation decisions.

B. The *Cox* Case

GNAPs, and AT&T also seek to rely on the FCC's Memorandum Opinion and Order in the *Cox* Case. As in the case of *Starpower,* the *Cox* case does not support their position, but instead supports the wisdom of the Department's interpretation of the WorldCom and GNAPs agreement in D.T.E. 97-116-C-F. A side-by-side comparison of those provisions reveals that the Cox agreement differs significantly from the WorldCom and GNAPs agreements. *See* attached Attachment 1. Instead, that comparison demonstrates that the WorldCom and GNAPs agreements are similar to the Starpower-Verizon Virginia (formerly Bell Atlantic) agreements, which the FCC found unambiguously excluded reciprocal compensation for Internet-bound traffic.[8] For example, while the Cox agreement contains no definition of reciprocal compensation, the WorldCom agreement, the GNAPs agreement, and the first Starpower-Verizon Virginia agreement all state that reciprocal compensation is "as Described in the Act," which means "as described in or required by the Act and as from time to time interpreted" by the FCC or the state commission. Attach. 1.

GNAPs contend that the reference to Verizon MA's tariff in the agreement's definition of local traffic means that, like the Cox agreement, "the Agreement here similarly defines 'local traffic' by reference to a state tariff." GNAPs Comment at 11. Yet the definition of local traffic in the Starpower-Verizon Virginia agreements also references Verizon's tariffs. The key difference, as found by the FCC, is that the Cox agreement's "definition of 'local exchange

[8] Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc.*, Nos. EB-00-MD-19, 20, FCC 02-105, ¶¶ 30-31, 36 (rel. Apr. 8, 2002) ("*Starpower Order*").

traffic' does not speak in terms of 'origination' and 'termination' of traffic," *Cox Order* ¶ 25, while the definition of local traffic in the Starpower-Verizon Virginia agreements does use those terms and, therefore, "closely resemble[] the Commission's then-existing rule regarding the types of traffic subject to reciprocal compensation under section 251(b) of the Act," *Starpower Order* ¶ 12.[9] The definition of local traffic in the WorldCom and GNAPs agreements also speaks in terms of where traffic originates and terminates and, therefore, "reveal[s] an intent" for the agreement "to track the [FCC's] interpretation of the scope of section 251(b)(5)." *Id.* ¶ 31.[10]

GNAPs suggests that it is nonetheless determinative that the WorldCom and GNAPs agreements do not include a specific reference to analyzing calls on an "end-to-end" basis, as did the Starpower-Verizon Virginia agreements. GNAPs Comments at 11. Yet the *Starpower Order* contained two independent bases for the FCC's conclusion that the Starpower-Verizon Virginia agreements did not require reciprocal compensation for Internet-bound traffic: first, that the agreements link compensation to the Commission's end-to-end jurisdictional analysis, under which Internet-bound traffic is jurisdictionally interstate, and, second, that the "striking similarities" between the definition of local traffic in the agreements and the FCC's 1996 regulations implementing section 251(b)(5) "reveal an intent to track the Commission's interpretation of the scope of section 251(b)(5), *i.e.*, whatever the Commission determines is compensable under section 251(b)(5) will be what is compensable under the agreements."

[9] The FCC also found this to be the key difference between the Starpower-Verizon South agreement and the two Starpower-Verizon Virginia agreements. *See Starpower Order* ¶ 47 ("The Starpower-Verizon South Agreement['s] . . . . definition of 'local traffic' neither speaks in terms of 'origination' and 'termination' of traffic, nor references local calling areas. In this way, it *differs significantly* from the Starpower-Verizon Virginia Agreements.") (emphasis added).

[10] Verizon does not agree with the emphasis that the FCC has placed on the definition provisions of the agreements and contends instead that all of the agreements discussed above track federal law in requiring the parties to pay reciprocal compensation only for local traffic, that is, for traffic that originates and terminates in a local calling area. Nonetheless, it is clear that the definition sections of the WorldCom and GNAPs agreements contain the same reference to the origination and termination of traffic that the FCC found lacking in the Cox and Starpower-Verizon South agreements.

Starpower Order ¶¶ 30, 31. Thus, the FCC stated, referring to the definition of local traffic, that, "for this reason, *as well,* we find that the First and Second Starpower-Verizon Virginia Agreements exclude ISP-bound traffic from the definition of 'Local Traffic' (and therefore from reciprocal compensation obligations)." *Id.* (emphasis added); *see id.* ¶ 36 ("They *also* did so by tracking the Commission's construction of section 251(b)(5)") (emphasis added). Moreover, in concluding that the Starpower-Verizon South agreement required reciprocal compensation for Internet-bound traffic, the FCC noted first that the definition of local traffic did not track federal law and only second that the agreement did not link compensation to the "end-to-end" nature of the calls. *See id.* ¶ 47.

In sum, the FCC's *Cox Order* does not undermine the validity of the Department's currently effective reciprocal compensation decisions.

III. PARTIES' DUE PROCESS CONCERNS ARE UNWARRANTED

Various parties expressed concern regarding the fact that, in its Motion, Verizon MA proposed that the Department render the requested further clarification following an opportunity by the parties to file supplemental and reply comments as to the proper interpretation of the GNAPs and WorldCom Agreements. *See* Verizon Motion at 3. WorldCom and XO argue that proceeding in this fashion would violate the parties' due process rights and state law, which they contend entitles the parties to an opportunity for a hearing. WorldCom Comments at 7-9; XO Comments at 6-7. There is no merit to complaints regarding due process with respect to the limited issues that Verizon MA's motion seeks to have the Department address. Since 1998, parties have filed extensive pleadings addressing the proper interpretation of the language of the agreements at issue. The record before the Department is extensive. To date, an evidentiary hearing has never been convened, even prior to the now repudiated October 1998 decision, D.T.E. 97-116 (which GNAPs, RNK, and other parties contend was correct). Moreover, no

ruling by the Department has precluded any party from submitting any factual information deemed relevant to the proper interpretation of the agreements. The comment process proposed by Verizon MA will allow the parties to submit any additional relevant information they believe the Department should consider and is consistent with administrative efficiency and due process.[11] In any event, following its review of those comments, the Department is free to make a determination as to the value of a hearing in connection with providing the requested further clarification.

IV. CONCLUSION

For all of the foregoing reasons and those contained in its July 24, 2002 Motion to Re-Open Dockets, the Department should grant that motion.

Respectfully submitted,

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[11] Furthermore, AT&T's suggestion that the Department should broaden its review to include a review of all carrier agreements is unnecessary. The Department made it clear that if any carrier believes it has a legitimate claim pursuant to its interconnection agreement, then it is free to file such a claim with the Department. To date, AT&T has not initiated such an action and the Department should not expand these dockets which involve the interpretation of the WorldCom and GNAPs in the context of Verizon MA's motion.